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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35064-9-III

STATE OF WASHINGTON, Respondent,

v.

KYE CALEB ALLERY, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED

State Cases

Statutes

I. INTRODUCTION

The State tried Kye Allery for third degree assault, alleging that he spat on a law enforcement officer. Allery requested, and was denied, an instruction on the terms of RCW 10.31.030, which describes the requirements for service of a warrant in the State of Washington, to support his defense that the law enforcement officer was on a frolic at the time of the incident. He was convicted and now appeals, alleging that the denial of his proposed instruction deprived him of the ability to present a defense.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in declining to give Allery's proposed instruction, which accurately stated the law and was necessary for Allery to argue his defense.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Was Allery's proposed instruction an accurate statement of the law?

ISSUE 2: Did the trial court's refusal to give the instruction prejudice Allery by preventing him from arguing his defense to the jury?

IV. STATEMENT OF THE CASE

Patrick Green, a Department of Corrections Community Custody Specialist, was assigned to a U.S. Marshal task force with his primary responsibility being the location and arrest of wanted fugitives. RP 116, 121. On the day in question, U.S. Marshals contacted the Whitman County Sheriff's Office for assistance to arrest Kye Allery on outstanding warrants. RP 52-53, 54. They located him at his girlfriend's house and he surrendered cooperatively. RP 55, 59. He was arrested, handcuffed, and placed in the back of a patrol car. RP 59.

On the way to the jail, one of the marshals decided he wanted to take an updated photograph of Allery for his file. RP 78, 95-96. Because it was dark, he asked Green to help him by holding up a flashlight to illuminate Allery. RP 96. Green initially dimmed the light but the marshal said it was not bright enough, so he turned it up brighter. RP 129-30. Allery put his face down toward his knees and said, "Get that light out of my face." RP 130. The next thing he knew, Allery had launched up and he felt spit all over his face. RP 130. The marshal taking the picture saw Allery spit on Green and also saw the spit on Green's face afterward. RP 97, 104.

During the trial, the marshal acknowledged that he did not tell Allery who they were and did not show him the arrest warrant, even though he was aware that Washington law required him to show Allery the arrest warrant. RP 108-10. Green also acknowledged that he told Allery nothing about the reasons for his arrest. RP 139. The marshal described the flashlight as compact but very bright, acknowledged that there was no reason he could not have obtained a copy of Allery's booking photo instead, and admitted that Green might have been laughing at Allery as he ducked away from the light. RP 111-12.

Based on this testimony, Allery requested a jury instruction incorporating the language of RCW 10.31.030, which reads, in pertinent part:

> The officer making an arrest must inform the defendant that he or she acts under authority of a warrant, and must also show the warrant: provided, that if the officer does not have the warrant in his or her possession at the time of arrest he or she shall declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement.

CP 61; RP 148. Allery argued that the officers were on a frolic and were not acting in the course of their official duties because they failed to comply with the legal requirements for serving an arrest warrant. RP 148-49.

The trial court declined to give the instruction. RP 150. It did instruct the jury that "[a]n officer is not engaged in performing official duties if the officer is on a frolic of his or her own at the time of the assault," and also gave Allery's proposed lesser included instruction on assault in the fourth degree. CP 50, 53. The jury convicted Allery of the third degree assault charge, and the trial court sentenced him to 22 months' imprisonment. CP 67, 77, RP 193, 208. Allery now appeals, and has been found indigent for that purpose. CP 84, 86.

V. ARGUMENT

The sole issue on appeal is whether the trial court erred in declining to give Allery's proposed instruction on the requirements of RCW 10.31.030. Because the proposed instruction was an accurate statement of the law, and was necessary for Allery to explain to the jury why the officers were not acting in their official capacity when the assault occurred, denial of the instruction was error. Consequently, the conviction should be reversed and the case remanded for a new trial.

Each side is entitled to have the jury instructed on its theory of the case. *State v. Ponce*, 166 Wn. App. 409, 415–16, 269 P.3d 408 (2012) (*citing State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)). As a matter of due process, jury instructions must (1) allow the parties to

argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

A trial court's refusal to give a requested jury instruction is reviewed *de novo* where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (*citing State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

When sufficient evidence supports a theory of defense, it can be reversible error to refuse to instruct on the theory. *Ponce*, 166 Wash. App. at 419 (*citing State v. Griffin*, 100 Wn.2d 417, 419–20, 670 P.2d 265 (1983) (refusal to instruct on diminished capacity was reversible error; generalized instruction on criminal intent was not sufficient to apprise the jury of the effect of diminished capacity on intent); *State v. Conklin*, 79 Wn.2d 805, 807–08, 489 P.2d 1130 (1971) (voluntary intoxication defense instruction was required where supported by evidence; instruction that "intent to defraud" was a necessary element was insufficient); *State v. Gilcrist*, 15 Wn. App. 892, 895, 552 P.2d 690 (1976) (error to refuse to

instruct on involuntary intoxication defense), *review denied*, 89 Wn.2d 1004 (1977)). However, a specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. *Id.* (*citing State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L.Ed.2d 322 (1998)).

Whether the refusal to specifically instruct on a theory of defense would prevent the instructions as a whole from correctly apprising the jury of the law or prevent the defendant from arguing his defense theory determines the harmfulness of the error. *Id.* at 419-20 (*citing State v. Rice*, 102 Wn. 2d 120, 123, 683 P.2d 199 (1984) (without instruction on intoxication defense jury "was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory"); *State v. Turner*, 16 Wn. App. 292, 555 P.2d 1382 (1976) (when instructions considered as a whole permit a party to argue his theory of the case, then it is not error to refuse to give other requested instructions)). A court commits reversible error when it refuses to give a defense instruction when the refusal prevents the defense from arguing its theory of the case. *State v. Kidd*, 57 Wn. App. 95, 99, 786 P.2d 847 (1990) (*citing State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968)). The trial court should deny a requested jury instruction that presents a theory of the defendant's

case only where the theory is completely unsupported by evidence. *Koch,* 157 Wn. App. at 33 (*citing State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)).

In the present case, the State charged Allery with assaulting Green in the third degree. To prove the charge, the State had to show beyond a reasonable doubt that Green was engaged in official duties at the time of the altercation. RCW 9A.36.031(1)(g). Being engaged in official duties excludes a personal frolic of the officer's own devising. *State v. Hoffman*, 116 Wn.2d 51, 100, 804 P.2d 577 (1991); *State v. Mierz*, 127 Wn.2d 460, 479, 901 P.2d 286 (1995).

At trial, Allery's theory of defense was that the officers were on a personal frolic. To support this theory, he requested an instruction on the terms of RCW 10.31.030. The instruction requested accurately stated the law by setting forth, verbatim, the statutory requirements for service of an arrest warrant. It was factually justified because there was evidence in the record that the law enforcement officers involved in the incident knew of the legal requirements but did not follow them, nor inform Allery of the reason for his arrest. Moreover, the record also contains some evidence that the officers did not have a need to immediately take Allery's photograph (because they could have obtained a copy of his booking

photo after delivering him to the jail) but were simply tormenting him with the bright flashlight and laughing at his response. Factually, then, at least some evidence supported the defense argument that the officers were not engaged in legitimate law enforcement duties at the time of the incident, but were engaged in a frolic for their own amusement.

Under the facts of this case, the refusal to give the requested instruction prevented Allery from being able to argue his theory of the case. Although the court instructed the jury that Green was not engaged in official duties if he was on a frolic, the refusal to give the proffered RCW 10.31.030 instruction prevented Allery from being able to explain why the officers' actions were legally unsanctioned.

An analogous refusal to give the jury sufficient instructions to show how the defense case undermined an essential element of the charge occurred in *Conklin*. There, the State charged the defendant with first degree fraud, which required the State to prove specific intent to defraud. *Conklin*, 79 Wn.2d at 807. The defendant argued that he was too intoxicated and sleep deprived at the time to form the specific intent. *Id.* By refusing the proffered instruction on voluntary intoxication, the trial court deprived the jury of sufficient information evaluate the effect of the

defendant's intoxication on his ability to form the required mental state. *Id.* at 807-08.

Similarly here, the trial court correctly instructed the jury that Green was not engaging in official duties if he was on a frolic, but deprived the jury of essential information as to what those duties actually were. As such, Allery lacked an essential link in his argument that Green was on a frolic, because he could not show the jury the disparity between what Green was required to do, and what he actually did. This omission critically undermined the defense, particularly when Allery did not dispute that the spitting incident occurred, but only that it constituted the lesser misdemeanor offense rather than the charged felony.

Because Allery's instruction accurately stated the law and was supported by the evidence in the case, the trial court abused its discretion by refusing to give it. Further, the error rendered the trial fundamentally unfair because it prevented Allery from arguing his theory of defense. Accordingly, the conviction should be reversed and the case remanded for a new trial.

VI. CONCLUSION

For the foregoing reasons, Allery respectfully requests that the court REVERSE his conviction and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 7th day of August, 2017.

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Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7th day of August, 2017 in Walla Walla, Washington.

Breanna Eng

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